FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

PAULA HERVEY, formerly JONES, and DALE HERVEY, parents and natural guardians of SHARINA RAE-DAWN HERVEY, deceased,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to determine whether allowing Petitioners only twenty (20) days from receipt of the Special Master's Decision to file their Motion for Review under the National Vaccine Injury Compensation Program, 42 U.S.C.S. §§ 300aa-1 et seq. constitutes a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

2. Certiorari should be granted to determine whether 42 U.S.C.S. § 300aa-12(e)(1) precludes the Petitioners from filing their Motion for Review of the Chief Special Master's Decision thirty (30) days from receipt and notice of the Decision.

PARTIES TO THE PROCEEDING

Petitioners, Paula and Dale Hervey, are the parents and natural guardians of Sharina Rae-Dawn Hervey, deceased. They were the petitioners in the United States Court of Federal Claims, and the appellants before the United States Court of Appeals for the Federal Circuit.

Respondent, Secretary of Health and Human Services, was the respondent in the United States Court of Federal Claims, and the appellee before the United States Court of Appeals for the Federal Circuit.

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SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On June 28, 1996, the United States Court of Appeals for the Federal Circuit issued its opinion affirming the decision of the United States Court of Federal Claims.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Federal Circuit and its judgment of June 28, 1996. That judgment affirmed the lower court. Petitioners invoke the jurisdiction conferred on the United States Supreme Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution provides in part that

"No person shall... be deprived of life, liberty, or property, without due process of law."

STATUTE INVOLVED

42 U.S.C. § 300aa-12(e)(1) provides that

Upon issuance of the special master's decision, the parties shall have 30 days to file with the Clerk of the United States Claims Court [United States Court of Federal Claims] a motion to have the court review the decision. If such a motion is filed, the other party shall file a response with the Clerk of the United States Claims Court [United States Court of Federal Claims] no later than 30 days after the filing of such motion.

STATEMENT OF THE CASE

The Petitioners' filed their Petition for Compensation under the National Vaccine Injury Compensation Program, 42 U.S.C.S. Section 300aa-1 et seq., on May 30, 1991. A hearing was held on March 17, 1995, nearly four (4) years after Petitioners' filed their Petition. On July 14, 1995, Chief

Special Master Golkiewicz issued his Decision denying compensation in this case. On July 24, 1995, ten (10) days after the Decision was filed, counsel for Petitioners received the Decision. On August 23, 1995, thirty (30) days after receipt of the Decision, the Clerk of the United States Court of Federal Claims received Petitioners' Motion for Review and Memorandum of Objections to the Special Master's Decision. On August 24, 1995, Judge Miller of the United States Court of Federal Claims filed an Order returning Petitioners' Motion for Review unfiled, because the Motion was deemed to be untimely and it was not filed by the attorney of record. (As recognized by Respondent, Rule 11 of the Rules of the United States Court of Federal Claims allows review of Petitioners' Motion, despite the signature defect, if the Motion is deemed to be timely filed). The United States Court of Appeals for the Federal Circuit affirmed the lower court's decision on June 28, 1996.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Allowing Petitioners only twenty (20) days from receipt and notice of the Chief Special Master's Decision to file their Motion for Review constitutes a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution

The Fifth Amendment to the United States Constitution states that "[n]o person shall... be deprived of life, liberty, or property, without due process of law." A statute, in order to be valid under the Due Process Clause, must not be contrary to fundamental principles of liberty and justice. *Re Groban*, 352 U.S. 330, 334, 77 S. Ct. 510 (1957), citing *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S. Ct. 103.

The Due Process Clause requires, at a minimum,

> 'that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'

Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190 (1965), citing *Mullane v. Central Hannover Bank & Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656. As to notice,

> 'an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

Id., citing *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, other citations omitted. Thus, there can be no doubt that failure to give notice at all would violate "the most rudimentary demands of due process of law," especially if the result was to permanently deprive an opportunity to be heard. *Id.*

As to the opportunity to be heard,

> [a] fundamental requirement of due process is the 'opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Id. at 552.

The Supreme Court has often held that due process "is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S. Ct. 975 (1990). In order

> [t]o determine what procedural protections the Constitution requires in a particular case, we [the Supreme Court] weigh several factors: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'

Id., citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976).

42 U.S.C.S. § 300aa-12(e) provides in part that

> [u]pon issuance of the special master's decision, the parties shall have 30 days to file with the Clerk of the United States Claims Court [United States Court of Federal Claims] a motion to have the court review the decision. If such a motion is filed, the other party shall file a response with the Clerk of the United States Claims Court [United States Court of Federal Claims] no later than 30 days after the filing of such motion.

Due process does not require a right to appeal. *See, e.g., Griffin v. People of the State of Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956). But once a right to appeal is granted, any restriction on the right to appeal must be reasonably related to the governmental purpose and afford equal treatment. *Id.* The Government cannot discriminate in an arbitrary and capricious manner. *Id.*

In the case at bar, Petitioners filed their Petition on May 30, 1991. A hearing was held by the Chief Special Master on March 17, 1995, approximately one-thousand three hundred eighty-seven (1,387) days after filing their Petition. The Decision was filed approximately one-thousand five hundred four (1,504) days after the Petition was filed. Petitioners, however, had only twenty (20) days from receipt and notice of the Decision in which to file their Motion for Review of the Decision. This is grossly inequitable and was not intended by Congress. Furthermore, such an interpretation of Section 300aa-12(e) is contrary to fundamental principles of liberty and justice.

If the *Mathews* factors for determining Constitutional procedural protections are weighed in this case, the undeniable result is a violation of due process. First, the private interest that was affected by the Court of Federal Claims' Order was the Petitioners' right to have thirty (30) days to appeal the Special Master's Decision. Allowing them only twenty (20) days from receipt and notice of the Decision to file an appeal is an abrupt end to a four (4) year process. The Petitioners were therefore precluded from having the intended thirty (30) days in which to appeal the decision denying compensation.

Second, the risk of erroneous deprivation of Petitioners' private interest through the procedure used in implementing Section 300aa-12(e) is great. One must look

no further than the instant case to find an erroneous deprivation of a petitioner's private interest - they were allowed only twenty (20) days from notice of the Decision to file an appeal. And, if a petitioner were to receive a decision more than thirty (30) days from the date the decision was filed, he or she would be completely prohibited from filing any appeal at all. Furthermore, the probable value of additional or substitute procedural safeguards - allowing petitioners thirty (30) days from the receipt and notice of a decision to file an appeal - is also great. Such safeguards would prevent petitioners from having less than the intended thirty (30) days, and possibly a complete prohibition, to appeal.

Finally, the Government's interest that the additional or substitute procedural requirement would entail is great as well. The Program was established to provide compensation for vaccine-related injuries or deaths. 42 U.S.C.S. Section 300aa-10(a). The minimal to non-existent fiscal and administrative burden involved with allowing Petitioners an actual thirty (30) days from issuance and notice of the Decision in which to appeal would substantially further the purposes of the Program, and is therefore in the Government's interest. The statute's discrimination of the notice and response time is not rationally based on any governmental interest, but rather bad luck. A strict interpretation of the statute does not allow for a remedy to the unfair and unequal result.

If "issuance" is defined as "filed" in 300aa-12(e)(1), then that statute defeats procedural due process. Notice is defeated, because delay in the mail, either through mishap, relative location in the country, or the sending of the decision by the court clerk, could result in either no notice prior to the running of the appeal time, or diminished appeal time for those claimants unlucky enough to suffer a delay in the

receipt of the notice. And both of these scenarios result in either the complete denial of the opportunity to be heard or an arbitrary, capricious and unequal treatment of those claimants receiving late notice.

It is assumed that Congress intended to satisfy the due process requirements of the Constitution. It is also assumed that a goal when interpreting the Vaccine Act and its procedures would be to ensure that all complaints are treated equally and fairly when given the opportunity to seek judicial review of a Special Master's decision.

II.

42 U.S.C.S. § 300aa-12(e)(1) was not intended to preclude the Petitioners from filing their Motion for Review of the Chief Special Master's Decision thirty (30) days from receipt and notice of the Decision.

The Special Master's Decision was filed on July 14, 1995. It was not received by Petitioners, however, until July 24, 1995. Petitioners attempted to file their Motion for Review on August 23, 1995, thirty (30) days from receipt of the Decision. The Clerk of the Federal Claims Court, however, returned the Motion unfiled, in part because it was deemed untimely. According to the Court of Federal Claims, the Motion for Review should have been filed by August 14, 1995, twenty (20) days after receipt of the Decision. That, of course, left the Petitioners very little time to review the Decision, decide whether to file an appeal, and file their Motion for Review.

Section 300aa-12(e)(1) provides that a party's motion to review a special master's decision must be filed thirty (30) days from the "issuance" of the decision, while an opposing party's response to the motion must be filed within thirty (30)

days from the "filing" of the motion. Congress therefore intended for the time to challenge a special master's decision - thirty (30) days from "issuance" - to be different from the time to respond to the motion for review - thirty (30) days from "filing." Had Congress intended to require a motion for review to be filed within thirty (30) days from the "filing" of the decision, it could have done so. Congress obviously understood how to require such a response time, as evidenced by the use of the word "filing" in the second sentence of Section 300aa-12(e)(1).

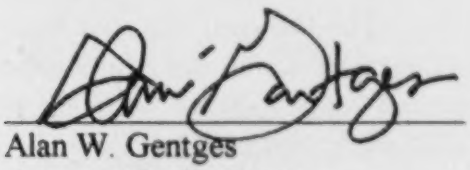
The National Vaccine Injury Compensation Program was established to provide compensation to the parents of children who suffer a vaccine-related injury or death. 42 U.S.C.S. § 300aa-10(a). To prevent review of the Chief Special Master's Decision because the Motion was filed thirty (30) days from the date of receipt and actual notice of the Decision, rather than thirty (30) days from the date of "filing", does not in any way further the purpose of the Program. In fact, under the Court of Federal Claims' Order and interpretation of Section 300aa-12(e)(1), a petitioner who received a special master's decision thirty-one (31) days after it was filed, due to postal, court clerk or other error, would be completely precluded from filing a motion for review. Congress did not intend such a harsh result when it drafted Section 300aa-12(e)(1). Allowing a motion to be filed thirty (30) days from actual receipt and knowledge of the decision, rather than thirty (30) days from the "filing" of the decision, would prevent such a result.

Conclusion

Congress intended a petitioner to have thirty (30) days to file a motion for review. In the case at bar, counsel for Petitioners did not receive the Decision until ten (10) days after the date it was filed, which left only twenty (20) days to

review the Decision and file an appeal. This result, and the risk of a complete bar to an appeal if the Decision is not received within thirty (30) days from the date it is filed, was not intended by Congress. In addition, the Court of Federal Claims' Order, returning the Motion unfiled because it was received by the clerk thirty (30) days from receipt and notice of the Decision, not thirty (30) days from the date it was filed, constituted a violation of Petitioners' due process rights.

Respectfully submitted,



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Appendix A - Opinion of the United States Court of Appeals for the Federal Circuit, filed June 28, 1996

United States Court of Appeals for the Federal Circuit

96 - 5007

PAULA HERVEY, formerly JONES, and
DALE HERVEY, parents and natural guardians
of SHARINA RAE-DAWN HERVEY, deceased,

Petitioners-Appellants,

V.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

DECIDED: June 28, 1996

Before ARCHER, Chief Judge, NIES, Senior Circuit Judge, and BRYSON, Circuit Judge.

BRYSON, Circuit Judge.

In this Vaccine Act case, the petitioners sought review of the decision of a special master denying compensation. Their petition for review, however, was not filed within the 30-day period allotted under the statute. For that reason, the Court of Federal Claims held the motion time-barred and refusal to entertain it. We affirm.

I

In 1991, the petitioners filed a petition for compensation under the National Childhood Vaccine Injury Act (the Vaccine

Act), 42 U.S.C. §§_ 300aa-1 to 300aa-34. The case was assigned to a special master, who held a hearing and issued a decision on July 14, 1995, denying compensation. The special master concluded that the petitioners had failed to prove that their daughter had experienced a qualifying injury that led to her death.

The Vaccine Act permits a petitioner to seek review of a special master's decision by filing a motion for review in the Court of Federal Claims. To obtain review, the petitioner must file a motion in the Court of Federal Claims within 30 days of the issuance of the special master's decision. 42 U.S.C. § 300aa-12(e)(1). The petitioners in this case did not file their motion for review in the Court of Federal Claims until August 23, 1995, which was 40 days after the special master's decision was filed. Holding that the motion was not filed within 30 days of the issuance of the special master's decision and that the 30-day period in Section 12(e)(1) of the Vaccine Act is jurisdictional, the Court of Federal Claims directed that tie motion be returned unfiled. The petitioners then prosecuted this appeal, seeking to have their case reinstated and returned to the Court of Federal Claims for further proceedings there.

II

The language of the Vaccine Act and a prior decision of this court foreclose the petitioners' contention that their motion for review was timely.

Section 12(e)(1) of the Vaccine Act, 42 U.S.C. § 300aa-12(e)(1), provides as follows, in pertinent part:

> Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision.

In Widdoss v. Secretary of the Dep't of Health & Human Servs. , 989 F.2d 1170 (Fed. Cir.), *cert. denied*, 114 S. Ct . 381 (1993), this court held that the 30-day time period for a motion for review is jurisdictional, and that neither the Court of Federal Claims nor this court may excuse a failure to satisfy the 30-day filing

requirement. The only remaining question under the statute is whether the petitioners' filing on August 23, 1995, was within 30 days of the "issuance of the special master's decision." We hold that the date of "issuance" of the special master's decision was not the date on which it was received by the petitioners' counsel, as the petitioners contend, but rather the date on which the decision was filed with the clerk of the Court of Federal Claims.

The term "issuance" in section 12 (e) (1) cannot be construed to mean "receipt." The pertinent common meaning of the verb "issue" is "to be given out officially, to be published," and its legal meaning is "to send out officially..... to publish or utter." Webster's New International Dictionary 1319 (2nd ed. 1953) . Both of those definitions denote promulgation of the decision by the decision maker, not its subsequent receipt by the parties. See also Black's Law Dictionary 745 (5th ed. 1979) ("issue" means "to send forth, to emit, to promulgate"); Webster's' Third New International Dictionary 1201 (1968) ("issue" means "the act of officially putting forth . . . or proclaiming or promulgating (as a written order or directive)"). To be sure, the term "issuance," as used in section 12(e)(1), could be accorded several slightly different meanings. For example, it could be interpreted to mean rendition, to mean public announcement, or to mean formal filing with the clerk of the court. Rule 23 of the Vaccine Rules, R. Ct. Fed. Cl., Appendix J, interprets the term "issuance" to mean filing, so that the 30-day review period begins to run when the special master's decision is filed with the clerk of the Court of Federal Claims. That interpretation is a reasonable one, and it has the virtue of providing an unambiguous and well-documented starting point for the 30-day period.

That interpretation of the term "issuance" is consistent with this court's decision in the Widdoss case. The special master filed her decision in that case on June 7, 1991, and the motion to review that decision was held to be untimely when it was filed on July 9 of the same year. This court held that the date of "issuance" of the special master's decision, within the meaning of Section 12(e) (1) of the Vaccine Act, was the date the master's decision was "actually issued," i.e., date it was filed. 989 F.2d at 1175.

We therefore hold that the date of issuance for purposes of Section 12(e)(1) was July 14, 1995, the date the special master's decision was filed with the clerk of the Court of Federal Claims. The period within which a motion for review had to be filed thus ended on August 14, 1995, the Monday following the end of the 30-day period that began on July 14. The petition for review, which was not filed until August 23, 1995, was therefore nine days out of time.

The petitioners do not make an effort to square the language of the statute with their position that the 30-day period should run from their counsel's receipt of the special master's opinion. Instead, they argue that the general policies of the Vaccine Act would be disserved by making the amount of time available for seeking review of a special master's decision depend on how long it takes for a party to receive notice of the decision. In this case, for example, the petitioners contend that them did not receive a copy of the decision until July 24, 1995, after 10 days of the 30-day period had expired. At that time, they argue, they were left with only 20 days within which to prepare a motion for review, rather than the 30 days that the statute contemplated. While it is true that the time consumed in delivering notice of a decision to the parties or their counsel may result in some reduction in the amount of time allotted to prepare the motion for review, the concern raised by that problem is not sufficient to overcome the very clear statutory language. Congress specified that a motion for review would have to be filed within 30 days of "issuance" of the special master's decision, not 30 days of its receipt. For purposes of the petitioners' statutory claim, that is the end of the matter.

The petitioners make a constitutional claim as a backup to their statutory argument. They claim that applying the statute as written, which gave them only 20 days to prepare their motion for review in the Court of Federal Claims, resulted in a violation of the Due Process Clause of the Fifth Amendment.

We can find no support for this argument in any principle of constitutional law. Although the petitioners argue that due process would be denied in a case in which a petitioner did not receive notice of the special master's decision until after the 30-day period

had expired, that is not this case and we need not address that hypothetical case in order to decide the due process question presented here. The petitioners had 20 days within which to decide whether to seek review of the special master's decision and to prepare and file their motion. A 30-day review period, even when shortened somewhat by a delivery delay, is not an unreasonably short period of time within which to seek review of a lower tribunals decision. See 28 U.S.C. § 2107; Fed. R. App. P. 4(a) (standard 30-day period within which to take an appeal from a decision of a federal district court in a civil case runs from the date the order or judgment is entered, regardless of when the losing party receives notice); Fed. R. App. P. 4(b) (only 10 days allotted to a defendant to notice an appeal in a criminal case); see also Fed. R. Civ. P. 50 (b) , 59 (b) (in civil cases, motions for judgment as a matter of law or for a new trial must be filed within 10 days of judgment); Fed. R. Crim. P. 29(c), 33, 34 (in criminal cases, motions for judgment of acquittal, new trial, or arrest of judgment must be filed within seven days of verdict).

Because we find no due process violation flowing from the loss of 10 days of the 30-day period for filing a motion for review in the court of Federal Claims, we conclude that the petitioners' motion was jurisdictionally out of time and therefore was correctly held insufficient to preserve the petitioners' right to review of the special master's decision.

AFFIRMED.

Appendix B - Judgment of the United States Court of Appeals for the Federal Circuit, filed June 28, 1996

United States Court of Appeals for the Federal Circuit

96 - 5007

PAULA HERVEY, formerly JONES, and
DALE HERVEY, parents and natural guardians
of SHARINA RAE-DAWN HERVEY, deceased,

Petitioners-Appellants,

V.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

JUDGMENT

Appeal from a decision of the United States Court of Federal Claims in 91-1180V entered August 24, 1995, Judge Christine Odell Cook Miller.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY OR DER OF THE COURT

Dated: June 28, 1996

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: August 19, 1996

Appendix C - Order of the United States Court of Federal Claims

In the United States Court of Federal Claims

PAULA HERVEY, formerly JONES, and DALE HERVEY, parents and natural guardians of SHARINA RAE-DAWN HERVEY, deceased,

Petitioners,

No. 91-1180V
(Filed Aug. 24, 1995)

V.

SECRETARY OF THE DEPARTMIENT OF HEALTH AND HUMAN SERVICES,

Respondent.

ORDER

Petitioners' motion for review and memorandum of objections were received by the Clerk's Office on August 23, 1995, and submitted to chambers under cover of a Memorandum noting the following defects: 1) Pursuant to RCFC Appendix J, Vaccine Rule 23, the motion is untimely (due on August 14, 1995, judgment having been entered on August 21, 1995); and 2) pursuant to RCFC 11 and 8 1 (d), it was not signed by the attorney of record and the individual who did sign the pleading is not a member of the bar of this court. Accordingly,

IT IS ORDERED, as follows:

Pursuant to RCFC Appendix J, Vaccine Rule 23, the Clerk of the Court shall return petitioners' motion for review unfiled.

Christine Odell Cook Miller
Judge